

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARILYN FULLER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>FARMERS INSURANCE COMPANY</b>	)	Docket No. 262,620
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the October 1, 2002 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on April 2, 2003. Jeffrey K. Cooper of Topeka, Kansas, was appointed to serve as Board Member pro tem in place of retired Board Member Gary M. Peterson.

**APPEARANCES**

John G. O'Connor of Kansas City, Kansas, appeared for claimant. John R. Emerson of Kansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board the parties agreed that Dr. Clymer's four percent whole person functional impairment rating could be considered in determining claimant's preexisting functional impairment.

**ISSUES**

This is a claim for a December 18, 2000 accident and alleged injuries to the low back, left hip and left leg. The parties agreed that claimant's accident arose out of and in the course of employment. But the parties could not agree as to the nature and extent of claimant's injuries.

In the October 1, 2002 Award, Judge Foerschler determined claimant had sustained an additional 14 percent whole person functional impairment due to the December 18, 2000 accident and awarded claimant benefits for a 25 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent and its insurance carrier contend Judge Foerschler erred. They argue claimant's permanent partial general disability should be limited to any increased functional impairment as claimant is presently working for respondent earning as much now as before the accident. They also argue that claimant has sustained no additional impairment due to the December 2000 accident and, consequently, her request for permanent partial general disability benefits should be denied.

Conversely, claimant argues she has a 50 percent wage loss as she only works 20 hours per week. Accordingly, claimant requests the Board to find that claimant has a zero percent task loss and a 50 percent wage loss for a 25 percent work disability. Claimant argues the sick leave pay and vacation pay that claimant presently receives should not be considered in computing claimant's post-injury wages. Consequently, claimant requests the Board to affirm the October 1, 2002 Award.

The principal issue before the Board is the nature and extent of claimant's injury and disability. But in determining that issue, these other questions must be addressed:

1. Did claimant sustain any additional permanent injury or permanent impairment as a result of the December 18, 2000 accident?
2. Should sick leave pay and vacation pay be considered when determining claimant's post-injury wage for purposes of the permanent partial general disability formula?
3. Before the December 2000 accident, what functional impairment did claimant have due to her back?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

The Award should be modified to award claimant benefits for a 46 percent permanent partial general disability before August 27, 2001, and a five percent permanent partial general disability commencing that date.

On December 18, 2000, claimant slipped and fell, injuring her back. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent.

But this was not the first time that claimant had experienced back problems. In July 1996, claimant sustained a low back injury. An August 1996 CAT scan revealed degenerative disk disease in the lumbar spine at L3-4, L4-5 and L5-S1. And a January 1997 MRI revealed bulging disks at L3-4 and L4-5. Dr. Clymer, the physician who treated claimant for the 1996 injury, in November 1997 rated claimant as having a four percent whole person functional impairment. Additionally, Dr. Vito J. Carabetta examined claimant following the 1996 accident and in December 1999 rated claimant as having a five percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides).

The record includes medical opinions from three doctors regarding claimant's present functional impairment. First, Dr. Carabetta, who examined claimant in February 2001, determined that claimant had not sustained any additional functional impairment as he could find no objective changes in comparison to the earlier injury. The doctor, however, believed that claimant was then experiencing a great deal of pain and that she now needed work restrictions, including the opportunity to lay down numerous times per day for approximately 10 minutes at a time. In short, Dr. Carabetta believed the December 2000 accident limited claimant's ability to work but that she had no increased functional impairment as measured by the *Guides*.

On the other hand, Dr. Michael J. Poppa, who examined claimant in June 2001 at respondent and its insurance carrier's request, determined that before the December 2000 accident claimant had a 10 percent whole person functional impairment and after the accident claimant had a 12 percent whole person functional impairment. Considering claimant's job as an insurance underwriter, Dr. Poppa believed no restrictions were necessary. He also believed claimant should be able to work full-time.

Finally, Dr. P. Brent Koprivica, who in October 2001 examined claimant at her attorney's request, concluded that the December 2000 fall aggravated preexisting disk disease in claimant's low back. Dr. Koprivica agreed that claimant should only work 20 hours per week, which was the restriction that claimant's personal physician had placed upon her when she returned to work in August 2001. Moreover, Dr. Koprivica determined claimant had a 24 percent whole person functional impairment, which consisted of nine percent to the whole person for the degenerative disk disease and 17 percent to the whole person for loss of range of motion in the spine.

After considering and weighing the various medical opinions, the Board concludes that before the December 2000 accident claimant had a four percent whole person

functional impairment and that after the accident she now has a nine percent whole person functional impairment. In concluding that claimant's whole person functional impairment is now nine percent, the Board has disregarded the 17 percent impairment that Dr. Koprivica included for loss of range of motion in the spine. Dr. Koprivica admitted that he did not know whether claimant had any loss of range of motion before the December 2000 accident. And Dr. Carabetta's testimony established that claimant's present loss of range of motion was, if anything, minimally improved over what it was in December 1999.

The Board concludes claimant has sustained an additional five percent whole person functional impairment as a result of the December 2000 accident.

Following the December 2000 accident, on August 27, 2001 claimant successfully returned to her regular work on a part-time basis as an insurance underwriter, working only 20 hours per week. When claimant testified at the March 2002 regular hearing, claimant was earning \$45,757 per year, which is equivalent to the salary that she was earning at the time of the December 2000 accident. But claimant argues that she has sustained a 50 percent wage loss as one-half of her salary now comes from sick leave and, perhaps, some vacation leave. The Board disagrees.

The Workers Compensation Act defines wages as "the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment."<sup>1</sup> Accordingly, whatever sick leave pay and vacation leave pay claimant currently receives is included in computing claimant's post-injury wages. The wage loss prong of the work disability formula is intended to measure wage replacement. As long as claimant is receiving pay from her employer, it should not matter whether that pay is from work performed or from a benefit the employer provides.

The Board concludes that claimant had a 100 percent wage loss before August 27, 2001, but no wage loss commencing that date.

Claimant's permanent partial general disability is governed by K.S.A. 44-510e, which provides, in part:

**Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.** The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

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<sup>1</sup> K.S.A. 44-511(a)(3).

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

Claimant does not contend that she has sustained any task loss as a result of the December 2000 accident. Accordingly, for the period before claimant returned to work on August 27, 2001, claimant's permanent partial general disability is 50 percent, which is based upon a 100 percent wage loss and a zero percent task loss. Subtracting the four percent preexisting functional impairment, claimant is entitled to receive benefits for a 46 percent permanent partial general disability before August 27, 2001.<sup>2</sup>

For the period commencing August 27, 2001, claimant has no wage loss and, consequently, the permanent partial general disability is limited to the whole person functional impairment rating of five percent.

Should claimant's post-injury wages change, the parties may request review and modification of the Award as provided by the Act.

### **AWARD**

**WHEREFORE**, the Board modifies the October 1, 2002 Award, as follows:

Marilyn Fuller is granted compensation from Farmers Insurance Company and its insurance carrier for a December 18, 2000 accident and resulting disability. Based upon an average weekly wage of \$880.14,<sup>3</sup> for the period from December 18, 2000, through

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<sup>2</sup> See K.S.A. 44-501(c).

<sup>3</sup> This amount differs from the amount noted in the Award, which was \$878.40. The \$880.14 was determined by dividing claimant's annual salary at the time of her accident, or \$45,767.04, by 52 weeks.

August 26, 2001, Ms. Fuller is entitled to receive 33 weeks of temporary total disability benefits at \$401 per week, or \$13,233, along with three weeks of permanent disability benefits at \$401 per week, or \$1,203, for a 46 percent permanent partial general disability.

For the period commencing August 27, 2001, Ms. Fuller has a five percent permanent partial general disability and is entitled to receive an additional 16.85 weeks of permanent disability benefits at \$401 per week, or \$6,756.85, giving her a total award of \$21,192.85, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant  
John R. Emerson, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Director, Division of Workers Compensation